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Court Facilities Capital Review Board

By U.S. Mail and E-mail

December 4, 2013

Hon. A. Gail Prudenti
Chief Administrative Judge of the Courts
25 Beaver Street, 11th floor
New York, NY 10004

Re: Proposed amendment to 22 N.Y.C.R.R §§ 208.14-a and 210.14-a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment.

Dear Judge Prudenti:

As Chair of the Assembly Judiciary Committee, I am pleased to comment on the proposed court rules that would create and institute the use of standardized forms and affidavits statewide in consumer debt actions when a default judgment is sought.

I salute the court system's effort to reconcile differing practices among our courts through the use of standard forms and appreciate the need for the court system to better administer the sheer volume of cases filed by debt-buyers. However, I am deeply concerned that the proposed rules and accompanying forms may have unintended consequences and may set us back after the great strides made by the New York State Legislature, the New York State Attorney General, Office of Court Administration (OCA) and Chief Judge Jonathan Lippman in recognizing and combatting problems with false affidavits and robo-signing in the context of residential foreclosure litigation. The proposed rules, I fear, may also undermine other efforts and advances by OCA and the Legislature to protect consumers in the debt collection litigation arena.

Homeowner and consumer protections have been of primary importance to me. As you may know, I have sponsored changes in law concerning consumer debt actions¹ and have long been concerned about the problems with consumer debt collection, including those relating to default judgments, which are the subject of the proposed rulemaking. I have also been the chief sponsor of the recently enacted Certificate of Merit law where I joined OCA and the New York State Attorney General to protect

¹ See Chapter 575 of the Laws of 2008 which established the Exempt Income Protection Act and Chapter 568 of the Laws of 2009 which created and increased exemptions applicable in bankruptcy.

homeowners facing foreclosure and to prevent lenders from making a mockery of our legal system by deterring robo-signing in residential foreclosure cases.

The debt collection industry is fraught with abusive debt collection practices that are well documented. It is no secret that debt collection companies buy old debt from original creditors for pennies on the dollar. The records they buy are often incomplete and/or inaccurate, yet they sue. Numerous studies have been conducted that outline the abusive practices within the debt buying and collecting industry. The unscrupulous debt collection litigation practices highlighted by the studies include suing the wrong person, suing for monies that have been paid, suing on debts past the statute of limitations, suing on debts without proof of ownership of the debt and obtaining default judgments against people on the basis of fraudulent affidavits. Making matters worse, many consumer defendants in these cases are unrepresented.² To address many of the abuses outlined in these reports, I have sponsored the Consumer Credit Fairness Act (CCFA) since 2009.³ This Act would institute much needed reforms supported by over 160 organizations including civil legal services providers, various domestic violence prevention programs, bar associations, AARP and DC37.

The purpose of the CCFA is to stop abusive debt collection practices. The main thrust of the CCFA is to insist on specific recordkeeping to ensure that the judicial fact finding process is not shortchanged by the debt-buying marketplace. The bill would reward debt buyers and original creditors who keep proper records. Under this legislation, consumer credit plaintiffs are not entitled to a judgment, particularly a default judgment, where they cannot set forth a prima facie case proving that they own the debt and have the evidence to prove that it is owed. The legislation also includes simple reforms that guard against sewer service, clarify the statute of limitations and address attempts to collect on debts that are stale and impose a time limit on the ability to collect stale debts.

The emphasis on recordkeeping is evident in the CCFA's requirement that a consumer credit debt collection complaint include a copy of the signed contract on which the debt is based, the name of original creditor, the last four digits of account number and the date and amount of last payment. The bill requires consumer debt plaintiffs to itemize damages sought by principal, finance charges, fees from original creditor, collection costs, attorney's fees, interest and any other fee or charge. The bill also contains reforms aimed at the debt buyer industry. Where the plaintiff is not the original creditor the complaint must set forth the date the debt was assigned to the plaintiff and include a chain of custody for the debt going back to the original creditor showing each prior owner and the dates of transfer. Under the CCFA, where the plaintiff is not the original creditor, applications for default judgments must include: an affidavit from the original creditor of the facts that underlie the debt, the default in payment, the sale or assignment of the debt and the amount due at the time of sale or assignment; an affidavit of sale by the debt seller completed by the seller or assignor for each subsequent assignment or sale of the debt to another entity; and an affidavit of a witness of the plaintiff which includes a chain of title for the debt.

² New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013); District Council 37 Municipal Employees Legal Services, *Where's the Proof?* (December 2009); Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (January 2013); The Urban Justice Center, Community Development Project, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*; MFY Legal Services Inc. Consumer Rights Project, *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the civil Court of the city of New York* (June 2008); Legal Aid Society et al., *Debt Deception: How debt buyers abuse the legal system to prey on lower-income New Yorkers* (May, 2010); National Consumer Law Center, *The Debt Machine: how the Collection Industry Hounds Consumers and Overwhelms Courts* (July 2010).

³ See Assembly Bill A2678 [Weinstein] – Passed Assembly/S2454 [Savino] – Referred to Senate Judiciary.

The proposed rule and accompanying forms, however, do not require the itemization of the debt or any of the specific documents that underlie it, such as the contract. The required information in the proposed forms relies too much on broad assertions of general facts about how a debt buyer business itself, or another business – the original creditor or a subsequent debt buyer - keeps its records as opposed to specific facts about the case at bar. This is because, typically, the debt-buyer does not have personal knowledge of the original creditor's and/or the previous owner of the debt's recordkeeping and is only passing on the representations from the creditor and/or the previous owner of the debt about their recordkeeping practices which may or may not be accurate. Given the magnitude of the studies which have found fault with the recordkeeping of the large banks, their attorneys and the debt-buyer industry this seems to be inadequate. Further, it would regularize the business practices of the debt-buying industry of bringing debt collection cases on the basis of incomplete and insufficient evidence to make out a prima facie case.

The studies cited above show that many debt-buyers file lawsuits and rely upon nothing more than a line on a spreadsheet about the debt to make their legal case even though the original creditors selling the spreadsheet frequently have disclaimers on the accuracy of the information in them. All too often, if the defendant appears in the case, the debt-buyers simply drop the suit and sell the debt to another debt-buyer and the process repeats itself. If a defendant appeared and moved to dismiss, the proposed forms would not provide enough information to overcome the defendant's motion. The result in default judgments should mirror the result in contested litigation. This is especially true with default judgments where the court must ensure that a New York judgment is granted on the merits.

Significant advancements have been made by OCA to address sewer service in New York City. The Uniform Civil Rules for the New York City Civil Court require the plaintiff to submit an envelope containing a notice of the action, prescribed by the court, to be sent to the defendant by the court clerk at the time the plaintiff files proof of service of the summons and complaint in a consumer debt transaction.⁴ This ensures that the service on the defendant was not sent to an obsolete address. The CCFA imposes similar requirements statewide and I encourage OCA to expand the court rule to make this notice a statewide requirement. The CCFA would also preserve a defendant's ability to raise the issue of improper service in consumer debt cases. If there is improper service, the judgment should be vacated.

I believe that court rules could complement the goals of the CCFA to meaningfully address current abusive debt collection practices. I look forward to working with OCA to reform consumer debt collection litigation practices in New York in the same way we have joined together to address rampant abuses in the residential mortgage foreclosure arena.

Sincerely,



Helene E. Weinstein
Chair, Judiciary Committee
New York State Assembly

cc: John W. McConnell, Esq

⁴ 22 N.Y.C.R.R. §208.6 (h)



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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December 4, 2013

John W. McConnell, Esq.
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Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Dear Mr. McConnell:

On behalf of the Office of the Attorney General (“OAG”), we appreciate the opportunity to comment upon the proposed amendments by the Office of Court Administration (“OCA”) to 22 NYCRR § 208.14-a and 22 NYCRR § 210-a (collectively, the “Proposed Amendments”). The Proposed Amendments would require the use of standard form affidavits in consumer credit cases when the plaintiff seeks a default judgment, effectively extending to the rest of New York State certain procedures that were implemented by court rule in New York City. We commend OCA for recognizing that there is a need for uniform rules across the New York court system governing the form of proof required to obtain a judgment in a consumer credit case. As you will see from our comments below, based on the substantial problems that OAG has identified in the consumer credit litigation process, we urge OCA to go further and to implement a more comprehensive set of rules that will require plaintiffs in consumer credit cases to submit adequate proof in admissible form in support of their claims.

I. Background on Debt Collection Litigation

Every year, the OAG receives thousands of complaints from consumers about debt collection activity within the state, making debt collection one of the top consumer complaints received by our office.¹ Due in part to these complaints, over several decades the OAG has investigated unlawful or deceptive debt collection practices across a variety of players in the debt collection industry, including creditors, “debt buyers,” debt collection agencies, law firms, and process servers. Many of these investigations have specifically targeted abuses by the debt collection industry in the context of consumer credit litigation in New York courts. Through these investigations, OAG has identified a number of systemic problems that plague debt collection litigation in this State.

¹ See Office of the New York Attorney General, *A.G. Schneiderman Releases Top Ten Consumer Frauds of 2012*, Press Release (Mar. 5, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-releases-top-ten-consumer-frauds-2012>.

A. Acquisition of Debts and Initiation of Actions

Each year, the debt collection industry files hundreds of thousands of consumer credit cases in New York courts.² A majority of these actions are filed by debt buyers, companies that are in the business of purchasing portfolios of delinquent or charged-off debts from the original creditor on the debt (“Original Creditor”) or another debt buyer, who then seek to collect on the debt from consumers.³ Prior to the acquisition of these portfolios, the debt buyers have no relationship with the consumers who are allegedly responsible for the underlying debts. Most Original Creditors do not even tell consumers when a debt is assigned to a debt buyer; instead, the first notification of such an assignment comes from the debt buyer itself. In other words, these consumers first learn that their debt has been transferred to another entity when they receive collection-related correspondence from a company with whom they may be completely unfamiliar.⁴

After purchasing a portfolio of debts, many debt buyers first attempt to collect on the debt through non-judicial methods, such as through collection calls and letters. If these efforts prove unsuccessful, the debt buyers often commence litigation against the consumers seeking the value of the debts assertedly owed. The largest debt buyers operating in this State each file tens of thousands of such collection actions in New York courts in any given year.⁵

Based on the OAG’s review of numerous collection filings, the typical debt collection action in New York State is commenced by debt buyers who file form complaints that are often half a page or less and which do little more than recite the elements of the asserted causes of

² According to data obtained from OCA by one organization, in 2011 alone, debt collectors filed 195,105 consumer credit cases in city and county courts in New York. *See* New Economy Project, *The Debt Collection Racket in New York* (Jun. 2013), at 3, available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf> (“NEP Report”).

³ *See* NEP Report at 3.

⁴ *See* Advance Notice of Proposed Rulemaking by Consumer Financial Protection Bureau, *Debt Collection (Regulation F)*, 78 Fed. Reg. 67,847, 67,856 (Nov. 5, 2013), available at <https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f> (“[C]onsumers often become aware that their debts have been sold or placed with a third party for collection because they receive a communication to collect the debt or a written validation notice from the debt buyer or third party collector. Consumers may have difficulty recognizing a debt or knowing whom to pay because a debt may be sold and resold multiple times with different third-party collectors, with the result that a consumer may receive communications from several debt collectors, possibly naming several debt owners, over a period of several years.”); *see also Chase Bank USA, N.A. v. Cardello*, 27 Misc. 3d 791, 794 (Civ. Ct. Richm. Cnty. Mar. 4, 2010) (holding that “due process requires that notice of the assignment be given to the debtor by the assignor and not the assignee” because the “credit card holder had his or her agreement with the credit card issuer and not with the unknown third-party debt purchaser”); *South Shore Adjustment Co. v. Pierre*, 96717-09, 2011 N.Y. Misc. LEXIS 3767, at *6 (Civ. Ct. Kings Cnty. Jul. 27, 2011) (same).

⁵ For example, according to a search of the “eCourts” database of the New York State Unified Court System, Encore Capital Group, through its affiliate Midland Funding LLC, filed 32,314 debt collection actions in New York courts during the year 2012 alone. This total derives from aggregating the results of searches for the term “Midland Funding” within the “WebCivil Local” and “WebCivil Supreme” databases of the eCourts system.

action, usually breach of contract and “account stated.” Debt buyers rarely, if ever, include documentation in support of their filed claims. The limited information contained in these complaints makes it difficult for consumers to assess whether they actually owe the debts, whether the amounts claimed are proper, and whether there are any valid defenses to the demands for payment, including statute of limitations defenses. Indeed, the Federal Trade Commission concluded in one recent report that debt collection “[c]omplaints often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses” and therefore “States should require collectors to include more information about the debt in their complaints.”⁶

B. Applications for Default Judgment

The debt buyers’ failure to include sufficient information in their complaints to allow consumers to assess the merits of the claims against them undoubtedly contributes to the high default rate in consumer credit actions. The great majority of New York consumers do not respond to debt collection complaints.⁷ After a consumer fails to respond, debt buyers usually file with the court clerk boilerplate affidavits from their own employees in support of their applications for default judgments.⁸ In the affidavits, debt buyers typically attest to the

⁶ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), at 7, available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> (“2010 FTC Report”); see also *id.* at 16 (noting that several judges at FTC roundtable “expressed concern that the information in many debt collection complaints appears to be inadequate” as “consumers are often puzzled by the allegations that they owe a debt to an entity they do not recognize, and they are puzzled about the timing and amount of the alleged debt”).

⁷ Although estimates vary, well more than half of all debt collection lawsuits in New York, and perhaps up to 90% of such lawsuits, result in default judgments in favor of the plaintiff. See, e.g., 2010 FTC Report at 7 (noting that panelists in FTC roundtable “estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent”); New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Service Industry* (April 2010), at 4, available at <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf> (finding 79% of consumer credit cases filed in New York City Civil Court in 2008 resulted in default judgments against the defendant); The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor* (October 2007), at 17-18, available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf (finding that 80% of cases within randomly selected sample of New York City Civil Court debt collection actions resulted in a final default judgment against the defendant).

⁸ Debt buyers typically assert that their claims are for a “sum certain,” which allows them to file their default judgment applications with the court clerk, rather than a judge, pursuant to CPLR § 3215(a). There is a significant question as to whether an action to collect on a credit card debt is one actually seeking a “sum certain,” given the accumulated interest and fees that is typically claimed on the debt. See Conor P. Duffy, Note, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 *Fordham Urb. L.J.* 1147, 1195 (March 2013) (opining that “[c]alculating a sum certain in consumer credit actions is not a simple task,” as the amount due “is typically the result of complicated, and often dynamic, contract terms and thus is based on several variables, including the principal borrowed for purchases, an interest rate that often changes several times, and numerous over-the-limit and other fees and charges”); see also *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 915 (Civ. Ct. Richm. Cnty. Jan. 6, 2011) (holding that the documentation submitted “in almost all applications for a default judgment in consumer credit cases fails to provide the necessary ‘requisite proof’ to support entry of judgment pursuant to CPLR 3215(a)” as a sum certain).

consumer's breach of the contract with the Original Creditor, notwithstanding the fact that the debt buyers acquired the debts after they had been charged off by the creditors, and the debt buyers, therefore, have no personal knowledge of the claimed breaches. Debt buyers frequently also attest that account statements were sent by the Original Creditors to the consumers, thus allegedly creating an "account stated," even though they again lack any personal knowledge of the mailing of such statements.⁹ With respect to some entities and individuals, these debt buyer affidavits historically were often "robosigned" en masse, without any review prior to the execution of either the affidavits or the underlying account records pertaining to the debts.¹⁰

The debt buyers purport to base their testimony on "business records" that they receive from the Original Creditors, but without an affidavit from the Original Creditor laying a proper foundation for these records such testimony constitutes inadmissible hearsay. The business records exception to the hearsay rule requires, among other things, that an affiant establish that the documents at issue were created and maintained in the ordinary course of business. A debt buyer cannot itself lay this foundation for documents received from another entity.¹¹ The

⁹ "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. The agreement may be implied by the retention of account statements for an unreasonable period of time without objection." *Citibank (South Dakota), N.A. v. Jones*, 272 A.D.2d 815, 815 (3d Dep't 2000). To establish an account stated cause of action, the plaintiff must, among other things, "demonstrate mailing of the account or advance proof showing the account was received. Other elements of the cause of action – the lack of a protest and the failure to pay – must also be supported." *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219, 226 (Civ. Ct. N.Y. Cnty. Dec. 16, 2005).

¹⁰ See *Sykes v. Mel Harris & Assocs.*, 285 F.R.D. 279, 282 (S.D.N.Y. 2012) (finding debt buyer and other defendants had "obtained tens of thousands of default judgments in consumer debt actions, based on thousands of affidavits attesting to the merits of the action that were generated en masse by sophisticated computer programs and signed by a law firm employee who did not read the vast majority of them and claimed to, but apparently did not, have personal knowledge of the facts to which he was attesting"); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-67 (N.D. Ohio Aug. 11, 2009) (finding employees of debt buyer had signed between 200 and 400 computer-generated affidavits per day for use in debt collection actions without first reviewing any account records to confirm accuracy of affidavits); see also David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, Oct. 31, 2010, available at http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all&_r=0 (citing testimony by employee of one debt buyer that she had signed 2,000 affidavits per day, or the equivalent of roughly one affidavit every 13 seconds when allowing for a half-hour break for lunch).

¹¹ See, e.g., *Unifund CCR Partners v. Youngman*, 89 A.D.3d 1377, 1377-78 (4th Dep't 2011); *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331 (4th Dep't 2009); *South Shore Adjustment Co. v. Pierre*, 96717-09, 2011 N.Y. Misc. LEXIS 3767, at *3 (Civ. Ct. Kings Cnty. Jul. 27, 2011); *Crescent Recovery, LLC v. Burton*, No. 301149QTS2009, 2010 WL 5559108 (Civ. Ct. Queens Cnty. Sept. 22, 2010); *Cach, LLC v. Sliss*, CV10-0155, 2010 WL 3463717, at *2 (Auburn City Ct. Sept. 3, 2010); *Rushmore Recoveries X, LLC v. Skolnick*, 21161/05, 2007 WL 1501643, at *3 (Nassau Dist. Ct. May 24, 2007); *Palisades Collection, LLC v. Gonzales*, No. 548564 CV 2004, 2005 WL 3372971, at *1 (Civ. Ct. N.Y. Cnty. Dec. 12, 2005). Although many of these cases were decided upon a motion for summary judgment, the requirement that the debt buyer submit admissible evidence in support of its claims is equally applicable at the default judgment stage. See *State v. Williams*, 44 A.D.3d 1149, 1151-52 (3d Dep't 2007) (holding that on application for default judgment the plaintiff must provide "nonhearsay confirmation of the factual basis constituting a prima facie case"); *HSBC Bank USA v. Squitieri*, No. 232285/09, 2010 WL 4723444, at *3 (Sup. Ct. Kings Cnty. Oct. 22, 2010) (denying plaintiff's motion for default judgment "because plaintiff has failed to furnish the court with evidentiary proof in admissible form, such as an affidavit of someone with personal knowledge, that the allegations made out against them in the complaint are true"); *Rivera v. Laporte*, 120 Misc. 2d 733, 735 (Sup. Ct. N.Y. Cnty. 1983) ("The court's responsibility to assure that justice is done is not qualitatively different on a default than it is on a fully litigated motion. Thus, if proof is absent, insufficient, or untrustworthy [or

affidavits submitted by the debt buyers typically also include an unitemized statement of the amounts allegedly owed on the debts without any explanation as to how those amounts were derived. As with the debt buyers' pleadings, the applications for default judgment rarely, if ever, include original documentation (such as the underlying credit card agreement or account statements).¹²

Since May 2009, a New York City Civil Court Directive has required that debt buyers in New York City, but not elsewhere in the State, file a short affidavit from the Original Creditor on the debt with their applications for default judgments.¹³ This affidavit simply represents that on a specified date the Original Creditor sold a pool of debts to the debt buyer and transferred with that sale certain electronic records relating to that pool of debts. The affidavit provides no information about the individual debts included in the pool and fails to even confirm that the specific debt at issue in the lawsuit was included with the sale.¹⁴

C. Statute of Limitations

As noted, the papers submitted by the debt buyers ordinarily do not contain sufficient information to allow consumers to determine whether the claims asserted against them are within the applicable statutes of limitations. The OAG has determined through its investigations that as a result of this practice, the debt buying industry has been able to obtain default judgments in thousands of lawsuits that were filed outside of the limitations periods for the underlying claims.¹⁵

For example, Section 202 of the Civil Practice Law and Rules requires that for an action that accrued outside of the State to be timely filed in this State the claim must be within both New York's statute of limitations *and* the statute of limitations of "the place without the state where the cause of action accrued." CPLR § 202. Economic actions, such as consumer credit

if proper procedure has not been followed . . . the moving party cannot presume entitlement to the requested relief, even on default.").

¹² Debt buyers fail to include original account documentation with their court filings even though such materials are increasingly available to debt buyers at little or no expense. Indeed, the Office of the Comptroller of the Currency, the primary regulator of national banks and federal savings associations, has advised that when a bank sells a portfolio of debts to a debt buyer, the seller should include "sufficient" account documentation "to allow the debt buyer to collect accounts in the normal course of business without having to request additional documentation." Statement of the Office of the Comptroller of the Currency Before the Senate Subcommittee on Financial Institutions and Consumer Protection (July 17, 2013), at 13, *available at* <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>. Any additional materials required by the debt buyer should then be provided by the bank "for no charge, or a minimal charge once a certain threshold is reached." *Id.*

¹³ See DRP-182 of Directives and Procedures of the Civil Court of the City of New York (eff. May 13, 2009), *available at* <http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp182.pdf> ("DRP-182").

¹⁴ See DRP-182.

¹⁵ *Cf.* 2010 FTC Report at 29 (noting that "[o]ne New York legal services provider analyzed a sample of all the debt collection cases in its office over an eighteen-month period and found that over fifty percent of the cases for which sufficient information was available were filed after the statute of limitations period had expired").

cases, accrue where the plaintiff – or in the case of a suit by a debt buyer, the Original Creditor – resides.¹⁶ Until recently, the debt buying industry routinely failed to comply with the requirements of CPLR § 202 and instead only applied New York’s six-year statute of limitations for actions based on contractual obligation (CPLR § 213(2)), regardless of where the causes of action accrued.¹⁷ This resulted in the entry of default judgments on thousands of time-barred claims, as many states outside of New York have shorter statutes of limitations governing debt collection claims accruing in those jurisdictions.¹⁸

In response to this behavior, in June 2010, the Chief Clerk for the Civil Court of the City of New York required that all requests that the Clerk enter a default judgment in consumer credit actions be accompanied by an affidavit stating: (1) where the cause of action accrued; (2) if the action accrued outside of New York, the statute of limitations for that jurisdiction; and (3) a statement that after reasonable inquiry, the debt collector has reason to believe that the applicable statute(s) of limitations for the claim has/have not expired.¹⁹ This obligation only pertains to actions filed in New York City Civil Court and the Proposed Amendments would not extend this requirement statewide.

Although the courts have attempted to take several positive steps to protect consumers, consumer credit litigation in New York State and in New York City – where the greatest procedures are now in place – fails to conform to settled legal requirements to the severe detriment of consumers throughout this State. The debt collection complaints filed across the State do not provide sufficient notice to consumers of the basis for the lawsuits, depriving consumers of the information needed to formulate viable defenses, including that the claims are time barred, or that all, or a portion of, the debt has already been satisfied. The affidavits submitted in support of the applications for default judgment lack personal knowledge and do not contain sufficient admissible evidence upon which to predicate a judgment in favor of the

¹⁶ See *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999).

¹⁷ In April 2010, the Court of Appeals reaffirmed in *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 415 (2010) that CPLR § 202 requires plaintiffs, including debt buyers, to file their actions within the statutes of limitations of both New York and the jurisdiction in which the cause of action accrued. The OAG has found that most debt buyers modified their litigation procedures to comply with the requirements of Section 202 after the Court’s decision in *King*.

¹⁸ Many creditors are incorporated or have their principal place of business in Delaware, which has a three-year statute of limitations. See Del. Code Ann. Tit. 10, § 8106. Several other states have statutes of limitations of three or four years. See, e.g., Cal Code Civ. Proc. § 337 (four-year statute of limitations for breach of written contract and account stated causes of action in California); Kan. Stat. Ann. § 60-512 (three-year statute of limitations in Kansas); Md. Code Ann. Cts. & Jud. Proc. § 5-101 (three-year statute of limitations for breach of contract and account stated causes of action in Maryland); N.C. Civ. Proc. § 1-52.1 (three-year statute of limitations in North Carolina); N.H. Rev. Stat. Ann. § 508.4 (three-year statute of limitations in New Hampshire); 42 Pa. Cons. Stat. § 5525 (four-year statute of limitations in Pennsylvania); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (four-year statute of limitations in Texas).

¹⁹ CCM-186A of Chief Clerk’s Memorandum of Civil Court of the City of New York (eff. Jun. 1, 2010), available at <https://www.nycourts.gov/COURTS/nyc/SSI/directives/CCM/CCM186A.pdf>.

plaintiff. We recommend that OCA take action through this regulatory process to comprehensively address these abuses in the consumer debt collection court proceedings.

II. The Proposed Amendments

The Proposed Amendments mandate the use of certain standard form affidavits whenever a plaintiff seeks a default judgment in a consumer credit case, effectively extending statewide the existing requirements of the New York City Civil Courts. Under the Proposed Amendments, in an action brought by a debt buyer, the Original Creditor is to attest that it sold a pool of charged-off accounts to the debt buyer on the specified date and transferred with that sale certain electronic records that had been kept in the Original Creditor's ordinary course of business. (Form C to Proposed Amendments.) The affidavit does not provide information specific to, or even identify, any of the individual debts in the pool; instead, it merely attests to the sale of the entire pool of debts by the Original Creditor to the debt buyer. The Proposed Amendments also provide templates for other form affidavits that are to come from the debt buyer itself, as well as any other debt buyers in the debt's chain of title. (Forms B, D-E to Proposed Amendments.)

The form affidavits required by the Proposed Amendments appear intended to address the problem of debt buyers improperly attesting to consumers' defaults even though such defaults occurred prior to the debt buyers' ownership of the debts. The comparatively minor fix to this problem suggested by the Proposed Amendments is to require an affidavit from the Original Creditor attesting to the sale of the debt pool and transfer of relevant electronic records to the debt-buyer plaintiff. A similar affidavit is already required in consumer credit litigations brought in New York City Civil Courts pursuant to DRP-182 of the Directives of the New York City Civil Courts. The Proposed Amendments would, with minor modifications, require this affidavit statewide.

As discussed above, the use of these affidavits in New York City Civil Courts has not resolved the most critical issues facing consumers: consumer credit actions continue to be initiated through boilerplate pleadings that do not inform consumers of the nature of the claims against them; applications for default judgment continue to be supported by affidavits from debt buyer employees who have no personal knowledge of the facts supporting the causes of actions; and default judgments continue to be predicated upon very limited, and often inadmissible, proof of the underlying claims.

While the Proposed Amendments would result in more uniform practices statewide, they fall short of redressing the problems endemic to consumer credit litigation in this State and may have the unintended consequence of sanctioning the filing of rote affidavits by Original Creditors and debt buyers. The Proposed Amendments permit debt buyers – entities that have no personal knowledge about the debts – to offer sworn testimony about the consumers' defaults on their obligations and the resulting amounts claimed to be owed. The Original Creditor affidavit required by the Proposed Amendments merely attests to the sale of a pool of debts to the debt buyer, but does not provide any information specific to the individual debts included within the sale (such as, for example, the amount allegedly due to the creditor at the time of the sale). We respectfully submit that only competent individuals with personal knowledge of the underlying facts should be allowed to attest to the merits of the debt buyers' claims.

Ultimately, the standardized affidavits required by the Proposed Amendments may be interpreted as placing the courts' imprimatur upon the filing of boilerplate affidavits by entities that have no actual knowledge of the debts being sued upon in tens of thousands of consumer credit litigations throughout New York State. This is a result to be avoided.

III. The OCA Should Implement More Comprehensive Consumer Credit Rules

We respectfully suggest that OCA adopt a more comprehensive approach to remedy the problems associated with consumer credit litigation in this State that strikes an appropriate balance between the legitimate right of creditors and their assignees to collect on unpaid debts and the procedural safeguards needed to protect consumers from abuses of the debt collection litigation process. The amendments we propose are consistent with recent actions taken by the judiciary and legislatures in other states with respect to procedures governing consumer credit litigation in those jurisdictions.²⁰

For example, the Maryland Office of the Attorney General and the Maryland judiciary recently collaborated in the drafting of new amendments to the Maryland judiciary rules to better address problems associated with debt collection litigation in that state. On September 8, 2011, the Court of Appeals of Maryland adopted these amendments and made them applicable to all actions commenced after January 1, 2012. Generally, the amendments require that affidavits submitted by debt buyers in connection with debt collection litigation attach proof relating to the existence and nature of the debt, the terms and conditions of the agreement sued upon, the plaintiff's ownership of the debt, and the itemized balance of the debt.²¹

Consistent with this recent precedent, we urge OCA to devise its own set of comprehensive procedures for consumer credit actions in this State. In the appendix to this letter, we set forth a proposed framework for such procedures that we believe appropriately balances the respective rights of debt collectors and consumers in this context. Briefly, this framework incorporates the following key components:

- Enhanced pleading requirements so that consumers may more fully assess the claims asserted against them, including requiring that complaints include information identifying the Original Creditor, the account at issue, and the complete chain of title of the debt, as well as an itemization of the amount allegedly owed by charge-off amount and post-charge-off interest and fees.
- Enhanced affidavit requirements at the default judgment stage, including requiring that all such affidavits come from individuals with personal knowledge of the

²⁰ See, e.g., September 8, 2011 Rules Order of the Court of Appeals of Maryland, available at <http://www.courts.state.md.us/rules/rodocs/ro171.pdf>; North Carolina Consumer Economic Protection Act of 2009, 2009 N.C. Sess. Laws 573 (N.C. 2009), available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S974v5.pdf>; California Fair Debt Buying Practices Act, 2013 Cal Stats. ch. 64 (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0201-0250/sb_233_bill_20130711_chaptered.pdf.

²¹ See September 8, 2011 Rules Order of the Court of Appeals of Maryland, available at <http://www.courts.state.md.us/rules/rodocs/ro171.pdf>.

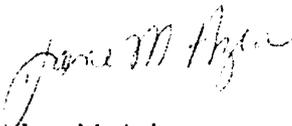
facts relevant to the plaintiffs' claims. In debt buyer actions, this requires the Original Creditor to provide an affidavit specific to the debt at issue that sets forth the facts constituting the asserted cause(s) of action and the amount allegedly owed to the Original Creditor at the time of assignment.

- Enhanced documentary proof requirements at the default judgment stage, including requiring that plaintiffs submit a copy of the original contract or other written instrument upon which the action is based (or a bill or account statement where such a writing does not exist).
- Enhanced statute of limitations compliance requirements at the default judgment stage, including requiring that plaintiffs provide information relevant to whether the action was filed within the applicable statute(s) of limitations for the underlying cause(s) of action.

IV. Conclusion

We support OCA in its efforts to establish uniform procedures to govern the hundreds of thousands of consumer credit actions that are filed in this State every year. We believe that uniformity alone will not solve the problems faced by consumers in New York State who are deprived of critical information needed to appropriately evaluate and assess their defenses in debt proceedings and who are subject to adverse judgments based on insufficient and inadmissible proof of the plaintiffs' underlying claims. In the appendix, we have outlined a more comprehensive approach to debt collection reform that is needed in New York State that appropriately balances the legitimate rights of the debt collection industry against the need to protect consumers from the abuses that plague consumer credit litigation in this State. This approach will also help prevent the court system from being misused by debt collectors as a tool to recover on debts through unreliable and legally insufficient proof of their claims. We welcome the opportunity to work with the OCA in the development and implementation of such procedures.

Sincerely,



Jane M. Azia
Bureau Chief
Consumer Frauds & Protection Bureau

APPENDIX

OAG's Recommended Procedures for Consumer Credit Actions

I. Recommended Pleading Requirements

To address the problem of form complaints that do not contain sufficient information for consumers to assess the claims asserted against them, including whether the consumers possess any valid defenses to the claims (such as the statute of limitations), OCA should require that:

Any complaint filed by a plaintiff in a consumer credit action must include the following information:

1. The name of the Original Creditor of the debt and the complete chain of title of the debt;
2. The last four numbers of the original account number;
3. The date of the consumer's last payment on the debt; and
4. The balance claimed to be owed on the debt, itemized in actions where the plaintiff is a debt buyer by (i) charge-off amount, (ii) post-charge-off interest, (iii) post-charge-off fees, charges, and expenses, and (iv) post-charge-off payments and other credits to which the consumer is entitled.

II. Recommended Proof Requirements for Default Judgments

To address the problems of the filing of applications for default judgments that do not contain sufficient admissible proof of the underlying claims, and the failure to provide proper notices of assignment in debt buyer actions, OCA should require that:

A. Original Creditor Actions: In an action by an Original Creditor to collect on a debt, the plaintiff must include the following documents and information with any application for a default judgment:

1. An affidavit based on personal knowledge from the Original Creditor that includes the following information:
 - a. The facts constituting the asserted cause(s) of action;
 - b. If the complaint asserts an account stated cause of action, (i) a statement indicating that an accounting was delivered by the Original Creditor to the consumer and the date of the delivery, and (ii) a statement that the accounting was retained and no objection to it has been made;

- c. Summary of the amount allegedly owed to the Original Creditor, including an explanation of how such amount was calculated; and
- d. Statement that a good faith effort was made to determine the current address for the consumer and that this is the address for the consumer set forth in the summons and complaint.

2. A copy of the original contract or written instrument upon which the action is based and any amendments thereto, or if the action is based on a debt for which a signed writing evidencing the debt does not exist, then a bill or statement reflecting the last consumer-initiated transaction on the debt.

3. A copy of any documents modifying the interest rate or fees applicable to the debt upon which the action is based.

B. Debt Buyer Actions: In an action by a debt buyer to collect on a debt, the plaintiff must include the following documents and information with any application for a default judgment:

1. An affidavit based on personal knowledge from the Original Creditor that includes the following information:

- a. The facts constituting the asserted cause(s) of action;
- b. If the complaint asserts an account stated cause of action, (i) a statement indicating that an accounting was delivered by the Original Creditor to the consumer and the date of the delivery, and (ii) a statement that the accounting was retained and no objection to it has been made;
- c. Statement that the debt was assigned to the debt buyer (or an intermediary debt buyer) on the specified date;
- d. Statement that notice of the assignment was provided by the Original Creditor to the consumer on the specified date;
- e. Statement that records specific to the debt at issue were created and maintained in the ordinary course of the Original Creditor's business and subsequently transferred to the debt buyer (or an intermediary debt buyer); and
- f. Statement of the amount owed to the Original Creditor at the time of assignment.

2. In addition to the affidavit from the Original Creditor, the debt buyer must submit an affidavit based on personal knowledge from any intermediary debt

buyers who owned the debt prior to the debt buyer that attests to the intermediary debt buyer's purchase and sale of the debt, the fact that electronic records pertaining to the debt were maintained in the ordinary course of the intermediary debt buyer's business, and that such records were subsequently transferred along with the debt to the debt buyer (or another intermediary debt buyer).

3. The debt buyer must also submit an affidavit based on personal knowledge from one of its own representatives that includes the following information:

- a. Summary of the complete chain of title of the debt, including annexing to the affidavit a copy of all assignments of the debt;
- b. Summary of the amount allegedly owed to the debt buyer, itemized by (i) charge-off amount, (ii) post-charge-off interest, (iii) post-charge-off fees, charges, and expenses, and (iv) post-charge-off payments and other credits to which the consumer is entitled; and
- c. Statement that a good faith effort was made to determine the current address for the consumer and that this is the address for the consumer set forth in the summons and complaint.

4. A copy of the original contract or written instrument upon which the action is based and any amendments thereto, or if the action is based on a debt for which a signed writing evidencing the debt does not exist, then a bill or statement reflecting the last consumer-initiated transaction on the debt.

5. A copy of any documents modifying the interest rate or fees applicable to the debt upon which the action is based.

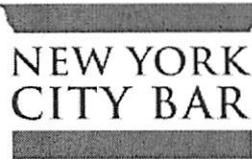
III. Recommended Statute of Limitations Requirements for Default Judgments

To address the problem of the filing of applications for default judgments that are outside of the applicable statute of limitations, OCA should require that:

In an action by a plaintiff to collect on a debt, the plaintiff must submit an affidavit (which may be from the plaintiff's attorney) that includes the following information with any application for a default judgment:

1. The jurisdiction where the cause of action accrued;
2. The statute of limitations for the jurisdiction in which the cause of action accrued; and

3. A statement that after reasonable inquiry, the Original Creditor has reason to believe that the applicable statute(s) of limitations has/have not expired.



NEW YORK
CITY BAR

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**CIVIL COURT COMMITTEE
CONSUMER AFFAIRS COMMITTEE**

**Comments on proposed amendment of 22 N.Y.C.R.R. §§ 208.14-a and 210.14-a
to adopt the use of forms for default applications in consumer debt cases**

THE PROPOSED RULE AMENDMENT IS OPPOSED

These comments are with regard to the New York State Office of Court Administration (OCA) proposed amendment of 22 N.Y.C.R.R. §§ 208.14-a and 210.14-a relating to adoption of statewide affidavit forms for use in consumer credit actions seeking award of a default judgment.

As OCA is well aware, default judgments in consumer credit actions—often of questionable merit—are widespread in New York. Since consumer debt filings exploded in the mid-2000s, illegal and improperly entered consumer debt judgments have harmed hundreds of thousands of New Yorkers who have been subject to bank liens and wage garnishment and have faced barriers to housing, employment, affordable credit, and critical consumer services and products.

We recognize that OCA is attempting to address the serious problem of “requirements of proof in consumer credit matters where banks and credit card companies assign their interest in credit card debt to third parties,” particularly “proof of ownership of the debt.” We also agree that there is substantial value in having uniform forms for courts to use.

However, we believe the proposed forms do not effectively address the problem because the forms would still permit debt-collectors to use “robo-signed” affidavits. Indeed, the proposed forms would facilitate the entry of default judgments based on hearsay and without establishment of the plaintiff’s prima facie case, including a clear chain of title for the debt at issue. We urge OCA not to adopt this proposed rule. Instead, OCA should adopt a rule requiring - in every case - the submission of an affidavit from the original creditor attesting to the basic facts of the alleged debt based on personal knowledge of the original creditor’s records and billing practices. In addition, we set forth other comments and recommendations below.

FEATURES OF THE PROPOSED STATEWIDE FORMS

Key provisions of the proposed statewide forms include the following:

1. The proposed rule amendments affect New York Rules of Court, Part 208, Uniform Civil Rules for the New York City Civil Court and Part 210, Uniform Civil Rules for the City Courts Outside the City of New York. They do not amend Part 212, Uniform Civil

Rules for the District Courts. In Nassau and Suffolk counties, consumer debt cases are filed in the District Court.

2. The proposed rule amendments to 22 N.Y.C.R.R. §§ 208.14-a and 210.14-a set out form affidavits that creditors must complete in order to apply for a default judgment. These include affidavit forms: for an original-creditor plaintiff; for a debt-buyer plaintiff; for an original creditor in connection to the sale of an account; of a debt buyer in connection with the chain of title of an account; and of a debt buyer in connection with the sale of an account.

REASONS FOR OPPOSITION

I. **The Proposed Affidavit Forms Will Condone “Robo-Signing” and Fail to Comply With Evidentiary and Other Requirements**

A. **The Form Affidavits Fail to Establish Chain of Title**

One of the most problematic aspects of the proposed form debt buyer affidavits is that they do not accomplish one of their main goals: establishing a chain of title for the alleged debt. A complete and accurate chain of title is essential to due process; as in the mortgage context, the chain of title requirement prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. As one court noted:

[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation.¹

The affidavits fail to establish a chain of title because they do not require the original creditor to testify about the sale of the particular debt at issue. The original creditor affidavit requires only a statement that the original creditor “sold a pool of charged-off accounts” to a debt buyer. It does not require the original creditor to confirm that the particular debt at issue was, in fact, part of the sale.

Similarly, intervening owners (classified as “debt sellers” by the directive) state that they “sold a pool of charged-off accounts” to a debt buyer and that they “had previously bought the Accounts” from a different entity. The proposed debt seller’s affidavit does not confirm that the specific account at issue was part of the sale. Moreover, this affidavit is highly likely to be inaccurate because debt sellers usually buy accounts from multiple sources, including original creditors and other debt sellers, and then break the accounts up into different packages for resale.

¹ *Chase Bank USA, N.A. v. Cardello*, 896 N.Y.S.2d 856 (N.Y. Civ. Ct. Richmond County 2010).

It is thus extremely unlikely that a debt buyer would obtain a “pool of charged-off accounts” from one entity and then sell that same “pool” to another entity, as stated in the proposed affidavit.

The only way to establish a complete chain of title is for the original creditor to affirm that it sold *the particular account* to Debt Buyer A. Debt Buyer A must then affirm that it sold *the particular account* to Debt Buyer B, and so on until the chain reaches the plaintiff. OCA should, at a minimum, revise the proposed affidavits so that they provide a complete chain of title for the specific debt at issue.

B. The Form Affidavits Allow Debt Buyers to Obtain Judgments Entirely on Hearsay

Another troubling aspect of the proposed form affidavits is that they allow debt buyers to testify to facts that are not within their knowledge. In the proposed form affidavits, it is the debt buyer that affirms that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. The debt buyer makes these statements based on access to the debt buyer’s own books and records. However, as the FTC has confirmed, **the debt buyer has no information in its possession to support these assertions.**² And, even if the debt buyer did have access to this information from the original creditor, which it does not, its testimony would be entirely based on hearsay.³

It is the original creditor, and only the original creditor, that has the relevant information about the debt and is in the proper position to attest to the basic facts about the alleged debt.

C. The Form Affidavits Allow Testimony from Unknown “Authorized Agents”

The original creditor and debt buyer affidavits would improperly allow an affiant to testify based on an assertion that he or she is a mere “authorized agent” of the plaintiff with “personal knowledge and access to plaintiff’s books and records . . . of the account of the defendant.” This statement does not restrict the universe of potential affiants to employees of the plaintiff. Instead, it would allow the affidavit to be completed by a third-party debt collector who has no formal

² See Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* ii-iii (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>. In a landmark study, the FTC’s key findings included that:

- “Buyers paid an average of 4.0 cents per dollar of debt face value.”
- “Buyers rarely received dispute history.”
- “Buyers received few underlying documents about debts.”
- “Accuracy of information provided about debts at time of sale [were] not guaranteed.”
- “Accuracy of information in sellers’ documents [were] not guaranteed.”
- “Limitations were placed on debt buyer access to account documents.” And,
- “Availability of documents [were] not guaranteed.”

Id.

³ We are also concerned about the representations in the affidavits that records received from others “were incorporated into the debt buyer’s records and kept in the regular course of business.” We fear third-party debt buyers may attempt to use these affidavits as an end run around longstanding evidentiary requirements related to the use and admissibility of business records. As is clear, “the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records.” *People v. Cratsley*, 86 N.Y.2d 81, 90 (1995) (citation and quotation marks omitted).

affiliation with the plaintiff and no knowledge of its business practices, but merely receives electronic records long after they were created for the purposes of debt collection. Such an individual would not have personal knowledge of the account sufficient to comply with New York evidentiary law.⁴ To comply with evidentiary law, the courts should not allow testimony by “authorized agents.” Instead, OCA should require that the affiant be an employee of the original creditor, and that the affiant clearly set forth the basis for her knowledge.

D. The Proposed Forms Do Not Meet the Stringent Requirements To Ensure Compliance With CPLR 3215 And Evidence Law

CPLR 3215 governs the entry of default judgments and contains fundamental requirements meant to avoid rubber-stamping of a judgment simply because a defendant has failed to appear. Our concern is that the proposed rule would elevate process over substance and that the important elements of CPLR 3215 would be superseded by the use of the proposed forms. We emphasize below three subsections, which we believe would be particularly undermined if the rule goes into effect as proposed.

CPLR 3215(a)

CPLR 3215(a) permits a clerk, as opposed to a judge, to enter a default judgment when the amount in dispute is a “sum certain.” Although defaulted consumer debt, like other recoveries under a contract theory, is not a sum certain, the courts have been treating it as such. The low cost and ease of making default applications to a clerk, rather than a judge, is part of what has driven the debt buying business model in New York. Debt buyers have taken advantage of this loophole in the judicial process, effectively transforming the court into an arm of the debt collection industry. The Committees respectfully disagree that the amount in dispute in a consumer debt case is a “sum certain.” In its memorandum in support of the proposed amendments, OCA characterizes the sums in these cases as “liquidated damages.” That characterization is at odds with New York law.

The Court of Appeals has stated: “The term ‘sum certain’ . . . contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. The clerk then functions in a purely ministerial capacity.”⁵ When damages cannot be determined without resort to extrinsic proof, the amount sought does not qualify as a sum certain.⁶

Numerous court decisions in this state have made clear that the sum due on a credit card debt almost always requires resort to extrinsic proof, particularly as to the allowable interest rate.⁷

⁴ See *Unifund Ccr Partners v. Youngman*, 932 N.Y.S.2d 609,610 (App. Div. 4th Dept. 2011) (stating that affiant must have personal knowledge of business practices or procedures sufficient to establish how and by whom account documents are made and kept).

⁵ *Reynolds Security Inc. v. Underwriters Bank & Trust Company*, 44 N.Y.2d 568, 572 (1978) (citation omitted).

⁶ *Id.*; *Gaylord Bros. v. RND Company*, 523 N.Y.S.2d 4, 5 (App. Div. 4th Dep’t. 1987) (citing *Reynolds Security Inc. v. Underwriters Bank & Trust Company*, 44 N.Y.2d 568, 572 (1978)).

⁷ Professor David Siegel, in commentary to CPLR 3215(a), notes that default may be entered by for a sum certain “on contract claims whose damages are clear-cut by the terms of the contract itself, such as an action to recover the agreed price of items which are shown to have been delivered.” However, even this view requires that damages be “clear-cut”

Banks typically assess interest rates well in excess of New York's civil and criminal usury limits (16% and 25%). Late fees and penalties often comprise a significant portion of these debts as well. However, the plaintiff in a collection action may not collect this higher interest rate unless it can establish its entitlement to impose interest rates higher than the state usury cap.⁸ Courts have denied judgment to creditors in these cases, in part, because they failed to prove the applicable interest rate.⁹ In addition, late fees and interest charges vary over time, depending on the terms of the original contract and periodic amendments, which the consumer may or may not have ratified.

Of particular note is *Citibank (SD) N.A. v. Hansen*, a decision on inquest after the defendant defaulted at trial.¹⁰ The court acknowledged that “[b]y virtue of . . . th[e] default [at trial], defendant's liability is deemed established. But it leaves the Court to determine plaintiff's damages, upon the documentary evidence in the record.”¹¹ The court allowed interest only at the statutory rate of 9%, denying plaintiff the full amount of interest it sought.¹² Although the default occurred at trial and not on application to a clerk, the court in *Hansen* recognized that the amount of the debt is not certain.¹³ It depends, at least in part, on the applicable interest rate.

Aside from the need to prove the interest rate, a consumer debt is not a sum certain because consumers being sued for debts often contest the amount due. For example, a consumer might refuse to pay a cell phone or medical bill because of a dispute with the provider over the amount charged. Disputes also arise in the credit card context. Extrinsic proof such as billing statements is in fact necessary to prove the amount of damages, even when the consumer defaults.

Although the Committees disagree with OCA's policy of treating default applications in consumer debt cases as a sum certain, we also recognize that OCA may well maintain this policy to manage the huge volume of these applications. Clerks are not trained as lawyers, however, and they should not be asked to determine whether an applicant for a default judgment has met the legal requirements for proof. The standardized forms are an attempt to compensate for the lack of judicial oversight in these matters. To do that, they must contain the same requirements that a court would require in passing on a default application. As discussed above, the proposed affidavit forms, which contain conclusory statements alleging a sum due, without any explanation or description as to how that sum was calculated, including late fees and interest, and without the documentation supporting those calculations, do not satisfy the statutory requirement for “the requisite proof” of a sum certain.

by the contract terms. That is rarely the case in consumer debt matters. At minimum, it requires that the debt collector submit the contract governing the account and establish that it actually is the governing contract.

⁸ *Citibank (South Dakota), N.A. v. Zaharis*, 2011 WL 6738840 (N.Y. Sup. Ct. Queens County 2011); *Citibank (S.D.), N.A. v. Martin*, 807 N.Y.S.2d 284, 289 (N.Y. Civ. Ct. N.Y. County 2005); *American Express Travel Related Services Co. v. Assih*, 893 N.Y.S.2d 438, 443 (N.Y. Civ. Ct. Richmond County 2009); *Citibank (SD) N.A. v. Hansen*, 902 N.Y.S.2d 299, 305 (N.Y. Dist. Ct. Nassau County 2010); *Citibank (South Dakota), N.A. v. Mahmoud*, 866 N.Y.S.2d 90, 90 (N.Y. Civ. Ct. Richmond County 2008).

⁹ Cases cited *supra* note 8.

¹⁰ 902 N.Y.S.2d at 299.

¹¹ *Id.* at 301.

¹² *Id.* at 305.

¹³ *Id.*

CPLR 3215(e)

Although a defendant's default concedes liability, "[a] plaintiff seeking a default judgment under subdivision (e) of CPLR 3215 must present *prima facie* proof of a cause of action."¹⁴ Debt collectors typically allege two causes of action in consumer debt cases: breach of contract and account stated.

To establish a *prima facie* case of breach of a credit card contract, a plaintiff must establish: (1) the existence of a contract and any revisions; (2) that the card was issued to the defendant at his or her address; (3) that the defendant used the card to purchase goods and services; and (4) that the defendant breached that agreement by failing to pay what was owed.¹⁵ In contexts other than consumer debt cases, courts have denied default judgments where the party seeking the judgment "failed to include the underlying contract and assignment, and the assignor's affidavit did not provide the particulars of the contract assigned"¹⁶

To establish a *prima facie* case of account stated, a plaintiff must prove three elements: (1) the account was presented, (2) by mutual agreement it was accepted as correct, and (3) the debtor promised to pay the amount stated.¹⁷ In a consumer debt case, a creditor may succeed on a claim for account stated when it is supported by an affidavit by someone with personal knowledge of the manner in which the account statements were created, maintained, and mailed to the consumer.¹⁸ However, where the affidavit "is not based on personal knowledge of the generation and mailing to defendant of the credit card statements sufficient to satisfy the business records exception to the hearsay rule plaintiff has not made out a *prima facie* showing of an account stated."¹⁹

With respect to both causes of action, the basic elements of the claim must be tendered by affidavit of the original creditor.²⁰ If the plaintiff is a debt buyer, it must additionally tender proof of an assignment of a particular account.²¹ Employees and agents of the assignee cannot provide such proof through their own affidavits because they lack personal knowledge of the assignor's business and record-keeping practices.²²

¹⁴ *Silberstein v. Presbyt. Hosp. in City of New York*, 463 N.Y.S.2d 254, 256 (App. Div. 2d Dept. 1983).

¹⁵ See *Martin*, 807 N.Y.S.2d at 289; *CACH LLC v. Fatima*, 936 N.Y.S.2d 58, 58 (N.Y. Dist. Ct. Nassau County 2011); *Zaharis*, 2011 WL 6738840; *Palisades Collection, LLC v. Gonzalez*, 809 N.Y.S.2d 482, 482 (N.Y. Civ. Ct. N.Y. County 2005). While these cases involved decisions on motions for summary judgment, they are nevertheless instructive because they recite the elements for the causes of action in consumer debt cases. Although the level of proof may be lower for a default application than for a summary judgment motion, the elements of the debt collector's *prima facie* case are the same. There are few reported cases involving default in the consumer debt context and that is understandable given that default applications are not reviewed by judges. However, at least one court denied a debt buyer's summary judgment motion where the defendant had answered, but was in default for not having opposed the summary judgment motion. *Gonzalez*, 809 N.Y.S.2d at 482.

¹⁶ *Giordano v. Berisha*, 845 N.Y.S.2d 327, 328 (App. Div. 1st Dept. 2007).

¹⁷ See, e.g., *Bank of New York-Delaware v. Santarelli*, 491 N.Y.S.2d 980, 981 (Co. Ct., Greene County 1985).

¹⁸ See *Citibank (South Dakota) N.A. v. Jones*, 708 N.Y.S.2d 517, 518 (App. Div. 3rd Dept. 2000).

¹⁹ *CACH, LLC v. Davidson*, 873 N.Y.S.2d 232 (N.Y. Civ. Ct. N.Y. County 2008).

²⁰ *Martin*, 807 N.Y.S.2d at 289.

²¹ *Id.* at 291; see also *Giordano v. Berisha*, 845 N.Y.S.2d at 328.

²² See *Rushmore Recoveries X, LLC v. Skolnick*, 841 N.Y.S.2d 823, 823 (Dist. Ct. Nassau County 2007); *Palisades Collection, LLC v. Kedik*, 890 N.Y.S.2d 230, 230-31 (App. Div. 4th Dept. 2009).

CPLR 3215(f)

“The granting of a default judgment does not become a ‘mandatory ministerial duty’ upon a defendant’s default.”²³ A party seeking default must submit proof of its claim, as follows:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and *proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . .*²⁴

Under New York law, affidavits must satisfy the evidentiary requirement of foundation; to be admissible they “must demonstrate personal knowledge of essential facts.”²⁵ To establish personal knowledge, the affiant must make a showing of how she came to know the facts stated. An affidavit lacks probative value if it “fail[s] to assert facts from which personal knowledge . . . may be inferred.”²⁶ An affidavit that lacks an evidentiary basis for its assertions lacks foundation.²⁷

In consumer debt cases, courts have rejected affidavits in which the affiant simply claimed that he or she was “authorized” by the card issuer or assignee to make the assertions in the affidavit.²⁸ In *CACH, LLC v. Cummings*, the court said:

It is simply not good enough to be “authorized to make an affidavit.” This Court does not know [the affiant’s] relationship to Chase or how she knows the facts to which she is swearing . . . She does not state for whom she works, in what capacity and how she knows that . . . the amount she claims defendant owed Chase - is an accurate number.²⁹

Additionally, in the consumer debt context, courts have noted that an assignee of the debt lacks personal knowledge of the card issuer’s business and record-keeping practice and cannot provide the foundation for the originator’s business records.³⁰ Debt collectors do not typically submit the originator’s records with default applications, although their affidavits often recite that there has been a review of the records. This recitation gives no assurance of authenticity, however, because the assignee does not have personal knowledge of the originator’s business and record-keeping practices.

²³ *Gagen v. Kipany Productions, Ltd.*, 735 N.Y.S.2d 225, 228(App. Div. 3rd Dept. 2001).

²⁴ CPLR 3215(f) (emphasis added).

²⁵ *Martin*, 807 N.Y.S.2d at 289.

²⁶ *Dickerson v. Health Mgt. Corp. of Am.*, 800 N.Y.S.2d 391, 394 (App. Div. 1st Dept 2005) (citation omitted).

²⁷ *Grullon v. City of New York*, 747 N.Y.S.2d 426, 428 (App. Div. 1st Dept 2002).

²⁸ *Davidson*, 873 N.Y.S.2d at 232; *CACV of Colorado, LLC v. Santiago*, Index No. 22708/07 (N.Y. Civ. Ct., N.Y. County 2009) (Samuels, J.), available at <http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=117262>.

²⁹ 12/9/2008 N.Y.L.J. 29, col., Index No. 22747/07 (N.Y. Civ. Ct., N.Y. County 2007), available at <http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=106188>.

³⁰ *Skolnick*, 841 N.Y.S.2d at 823 (denying summary judgment to debt collector for failure to tender admissible evidence of claims, despite defendant’s default by failing to oppose the motion).

Although *Davidson*, *Santiago*, *Cummings*, and *Skolnick* were decisions on motions for summary judgment, this basic evidentiary requirement is not relaxed simply because the movant is seeking a default judgment.³¹ “A plaintiff seeking a default judgment under CPLR 3215 (subdivision e) must present prima facie proof of a cause of action.”³² The applicant must submit either a verified complaint or an affidavit asserting the essential elements of the cause of action, “so the court has nonhearsay confirmation of the factual basis constituting a prima facie case.”³³ Hearsay and broad statements of fact have “failed to provide the motion court with evidence sufficient to satisfy the court as to the prima facie validity of defendant's liability for the stated claims” needed for a default judgment.³⁴ Failure to support a motion for default judgment with an affidavit of facts constituting the claim is grounds for denying the motion.³⁵

The legislative history of CPLR 3215(f) supports this view. In 1964, subsection (e) of CPLR 3215 contained the proof requirements for a default application. It was amended, in pertinent part, as follows: “On any application for judgment by default, the applicant shall file [proof of service], and proof by affidavit made by the party of the facts constituting the claim . . .” McKinney’s 1964 Session Laws of New York. The Legal Staff Summary explains that this amendment was made to ensure some firsthand support for the claim:

This bill also amended the same subdivision to provide that any affidavit required hereunder shall be made by the party. An affidavit, including the facts constituting the claim and the amount due, is best made by the party because of his more intimate and direct knowledge of such facts. For the sake of convenience, this bill would permit an affidavit solely as to the default to be made by the party or his attorney.³⁶

As the First Department stated succinctly:

CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. . . . The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.³⁷

³¹ At least one court denied a debt buyer’s summary judgment motion where the defendant had answered, but was in default for not having opposed the summary judgment motion. *Gonzalez*, 809 N.Y.S.2d at 482. Although the plaintiff had tendered affidavits, account statements, and a contract, the court found all of the purported evidence to be inadmissible. *Id.* This case illustrates that when debt buyer evidence is subject to judicial review, it usually does not pass muster.

³² *Silberstein*, 463 N.Y.S.2d at 256.

³³ *State v. Williams*, 843 N.Y.S.2d 722 (App. Div. 3rd Dept. 2007) (holding overturned).

³⁴ *Martinez v. Reiner*, 961 N.Y.S.2d 116, 117 (App. Div. 1st Dept. 2013) (citations omitted).

³⁵ *Matone v. Sycamore Realty Corp.*, 818 N.Y.S.2d 463, 464 (App. Div. 2d Dept. 2006).

³⁶ Legal Staff of the Judicial Conference of the State of New York, “Summary of Significant 1964 Changes in New York Civil Procedure Law”, reprinted in 1964 N.Y. Sess. Laws 1909, 1911 (McKinney).

³⁷ *Joosten v. Gale*, 514 N.Y.S.2d 729, 732 (App. Div. 1st Dept. 1987) (citations omitted); *Feffer v. Malpeso*, 619 N.Y.S.2d 46, 47 (App. Div. 1st Dept. 1994) (same); accord, *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70 (2003) (upholding default judgment where record established “that plaintiff had personal knowledge of her claim against defendants”).

RECOMMENDATIONS

In light of the significant problem of “robo-signing” in consumer debt collection actions and the harm default judgments inflict on New Yorkers, the Committees make the following recommendations:

- Because consumer debt collection actions do not involve “claim[s] . . . for a sum certain,” entry of default action should occur following judicial inquest – either by hearing or on the papers submitted by the plaintiff.³⁸
- OCA should support passage of legislation like the Consumer Credit Fairness Act (A.2678/S.2454), which among other provisions sets out the specific evidentiary support required for a debt buyer to obtain a default judgment,³⁹ including an affidavit from the original creditor establishing the existence of the debt and the defendant’s default and affidavits proving all assignments of the debt. The bill also requires the plaintiff or plaintiff’s attorney to attest that based on reasonable inquiry, the statute of limitations has not expired.
- OCA should not adopt the proposed amendment and should issue a revised proposed amendment that conforms to the legal requirements discussed above.⁴⁰
- Applications for default judgments in consumer debt collection actions should include an affirmation by the plaintiff’s attorney that that the attorney has reviewed the documentary evidence in support of the application and that they comply with the legal requirements set out by court rule similar to the requirements for foreclosures.⁴¹

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³⁸ See N.Y. Uniform Civil Rules for the Supreme Court and the County Court 202.46 (2013)(b) (“In any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court or by written statements of the witnesses in narrative or question-and-answer form, signed and sworn to.”).

³⁹ The New York City Bar Association supports enactment of the bill with some modifications. See New York City Bar Association, *Report on the Consumer Credit Fairness Act – A.2678/S.2454* (Reissued Feb. 2013), available at <http://www.nycbar.org/pdf/report/uploads/20071915-CommentonConsumerCreditFairnessActReissued.pdf>.

⁴⁰ The Civil Court Committee has previously shared with Deputy Chief Administrative Judge for New York City Courts Justice Fern A. Fisher proposed form affidavits that meet evidentiary requirements. The Committees welcome the opportunity to submit proposed affidavit forms, should they be helpful to OCA. See also Appendix A (discussing how other states have addressed the problem of debt collectors seeking default judgment by requiring proof that complies with evidentiary law).

⁴¹ A. 5582A, 2013-2014 Reg. Sess. (N.Y. 2013); S. 4530A, 2013-2014 Sess. (N.Y. 2013). The law now requires foreclosure attorneys, when filing a case, to certify that they have reviewed pertinent documents (including the mortgage, security agreement and note or bond underlying the mortgage, and all instruments of assignment), that there is a reasonable basis for the commencement of the foreclosure action, and that the plaintiff is currently the creditor entitled to enforce rights pursuant to the information contained in the above documents. The attorney must also attach a copy of the mortgage, security agreement and note or bond underlying the mortgage, and all instruments of assignment.

APPENDIX A – THE EXPERIENCE OF OTHER STATES

Concern with the integrity of the court process and violations of consumers' due process and procedural rights have spurred reforms in other jurisdictions through the legislative process or administrative rulemaking to address the problem of meritless debt collection cases.

Most recently, California enacted the Fair Debt Buyer Practices Act, which specifically states what evidence debt buyers must have on hand when collecting debts, when filing debt collection suits, and when applying for a default judgment.⁴² To successfully obtain a default judgment in California, a debt buyer must have business records and a copy of the contract authenticated by a sworn declaration that establishes specific details about the alleged debt.⁴³

North Carolina passed legislation in 2009 preventing debt buyers from obtaining default judgments in the absence of properly authenticated business records that establish the amount and nature of the debt.⁴⁴ The law also requires debt buyers to attach to the complaint a copy of the contract, as well as an assignment or other writing establishing that the plaintiff is the owner of the debt. In the case of multiple assignments, proof of each assignment must be provided to establish an unbroken chain of ownership. Each assignment must contain the original account number of the debt purchased, and must clearly show the debtor's name associated with the account.⁴⁵

In Connecticut, the Small Claims Bench/Bar Committee has promulgated a checklist for processing judgments in small claims courts. As required by the checklist, debt buyers must provide an admissible affidavit showing unbroken assignment of the particular account.⁴⁶ Importantly, the affidavit cannot be a "generic" affidavit of debt by the original creditor.⁴⁷

The Maryland Court of Appeals approved similar changes to Maryland's Rules of Civil Procedure, requiring debt buyers seeking default judgment by affidavit to attach evidence of the existence of the debt, an itemization of the debt, the terms and conditions of the contract, and proof of plaintiff's ownership.⁴⁸ As proof of plaintiff's ownership, the debt buyer must provide in its affidavit a chronological listing of the names of all prior owners of the debt and the date of each transfer, and attach "a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner."⁴⁹ The rule is clear that the bill of sale or other document must contain a "specific reference to the debt sued upon."⁵⁰

⁴² S.B. 233 (Ca. 2013).

⁴³ Cal. Civ. Code § 1788.60 (2013).

⁴⁴ N.C. Gen. Stat. §§ 58-70-155(a)-(b) (2013) ("Prerequisites to entering a default or summary judgment against a debtor under this Part.").

⁴⁵ N.C. Gen. Stat. §§ 58-70-150(1)-(2) ("Complaint of a debt buyer plaintiff must be accompanied by certain materials.").

⁴⁶ Ct. Gen. Stat. § 52-118 (2013).

⁴⁷ Ct. Practice Book Sec. 24-24 (2013), available at <http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>.

⁴⁸ Md. Rule of Procedure 3-306(d)(1)-(4) (2013).

⁴⁹ Md. Rule of Procedure 3-306(d)(3).

⁵⁰ *Id.*

The concern with robo-signing of affidavits has caused stepped-up oversight of original creditor debt collection and debt sales, as well as intensified scrutiny and enforcement actions of the third-party debt collection industry⁵¹ and debt buyers.⁵² Collection firms have recently paid out a number of multi-million dollar settlements regarding allegations of “robo-signed” affidavits.⁵³ In 2012, the West Virginia Attorney General sued debt buyer Encore Capital Group alleging the use of false affidavits.⁵⁴ The Federal Trade Commission obtained a \$2.5 million civil penalty against another debt buyer, Asset Acceptance, LLC; the FTC’s complaint alleged, among other violations, that the debt buyer misrepresented that consumers owed a debt when it could not substantiate those claims and that it failed to disclose time-barred debt.⁵⁵ A federal judge recently found that in New York City, a single debt buyer “obtained tens of thousands of default judgments in consumer debt actions, based on thousands of affidavits attesting to the merits of the action that were generated en masse by sophisticated computer programs and signed by a law firm employee who did not read the vast majority of them and claimed to, but apparently did not, have personal knowledge of the facts to which he was attesting.”⁵⁶

⁵¹ See Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* i (July 2010), available at www.ftc.gov/os/2010/07/debtcollectionreport.pdf. The FTC reported “[t]he system for resolving disputes about consumer debts is broken.” *Id.* Among its findings, the FTC noted that: “Very few consumers defend or otherwise participate in debt collection litigation, resulting in courts entering default judgment against them Complaints often do not contain sufficient information to allow consumers in their answer to admit or deny the allegations and assert affirmative defenses.” *Id.* at iii.

⁵² See Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* iv (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>. The FTC has declared that “[t]he most significant change in the debt collection business in the past decade . . . has been the advent and growth of debt buying (*i.e.*, the purchasing, collecting, and reselling of debts in default).” *Id.* A 2013 study of the debt buying industry revealed that debt buyers paid an average of 4 cents per dollar of debt face value, rarely received dispute history, and received few underlying documents about the debt. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* ii-iii (Jan. 2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

⁵³ Horwitz, *Bank of America*, *supra* note 23. See also *Midland Funding, LLC v. Brent*, No. 3:08 CV 1434 4 (N.D. OH Aug. 12, 2011) (finding that the defendants engaged in “the practice of ‘robo-signing’ affidavits in debt collection actions” in violation of the federal Fair Debt Collections Practices Act).

⁵⁴ Complaint, *State of West Virginia v. Midland Funding LLC*, No. 12C-4-33 (Circuit Court of Kanawha County, West Virginia 2012), available at <http://ftpcontent.worldnow.com/wowk/Midland.pdf>. The Complaint alleged as follows:

58. Midland often filed false, mass-produced affidavits with its motions for default judgment and summary judgment.

59. Midland’s employees signed these affidavits attesting to the validity of the alleged debt without reading the affidavit they were signing, without reviewing the accounts’ records, and/or without having any knowledge of the validity of the alleged debts.

60. Midland and MCM filed false, mass-produced, computer-generated affidavits that were “robo-signed,” or signed without the affiant reading the contents of the document, and/or signed by MCM employees who had no personal knowledge of the validity of the debt or other facts to which they were attesting.

Id. at 9.

⁵⁵ Press Release, Federal Trade Commission, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception: Firm Also Will Notify Consumers with “Time-Barred” Debt That It Will Not Sue to Collect (Jan. 30, 2012), available at <http://www.ftc.gov/opa/2012/01/asset.shtm>.

⁵⁶ *Sykes v. Mel S. Harris and Associates*, 285 F.R.D. 279, 279 (S.D.N.Y. 2012).



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COMMENTS RE PROPOSED AMENDMENT OF 22 NYCRR § 208.14-A AND 22 NYCRR 210.14-A RELATING TO ADOPTION OF STATEWIDE FORMS FOR USE IN CONSUMER CREDIT ACTIONS SEEKING AWARD OF A DEFAULT JUDGMENT.

Standardization of proof required for entry of default judgments in consumer credit collection on a statewide basis is a laudable goal. These proposed forms, in their current versions, however, do not actually rise to the level of proof required for a default judgment to be entered. They confer legitimacy on affidavits sworn without personal knowledge. These forms will exacerbate the problem of “robo-signing” and ratify practices that do not conform to the requirements set forth by the CPLR. Requiring these forms to be submitted will do nothing to stem the overwhelming tide of these lawsuits. Making it easier for default judgments to be entered in the absence of proof will instead result in even more of these suits being filed.

From a reading of the proposed language of §208.14-a, it is unclear whether original creditors seeking to collect their own debts are “debt collectors.” Federal law distinguishes between original creditors collecting their own debts and entities seeking to collect debts originally owed to other organizations. In fact, the New York City Department of Consumer Affairs excludes original creditors collecting their own debts from the licensing requirement for debt collectors. New York City Administrative Code § 20-489.

Moreover, the holding in Youngman, attached to the proposed forms as Exhibit B, is that an affidavit sworn to by an employee of the plaintiff debt buyer, rather than an employee of the original creditor, was not sufficient to establish the proper foundation for business records of the original creditor to be admitted as evidence. The holding in Kedik, also attached as Exhibit B, was that an affidavit from plaintiff debt buyer’s agent failed to establish a proper foundation for the admission of an electronic spreadsheet prepared by the original creditor. These holdings in these cases require sworn statements made by individuals with personal knowledge of the records and the record-keeping practices of the original creditors in order to lay a proper foundation for the records to be admitted as evidence.

Nowhere in the proposed affidavits required for debt collectors suing on assignment is there any sworn statement regarding when the original creditor notified the defendant about the assignment. It is well settled law in New York that contemporaneous with the assignment of a debt it is the duty of the assignor to give notice to the account holder of said assignment (see

Chase Bank v. Cardello, 27 Misc.3d 791, 794 Civil Court Richmond County, J. Straniere, citing Tri City Roofers, Inc. v. Northeastern Industrial Park, 61 N.Y.2d 779, 781 (1984), also see LR Credit 21 LLC v. Paryshkura, 30821/10, NYLJ 1202477450341 (Dist. NA, Decided December 22, 2010). Due process and essential fairness would require the assignor to notify an account holder, lest that account holder continue to direct payments to an entity who no longer owns the account. “The trend in consumer protection law is to require such notice (see Uniform Consumer Credit Code § 3.204) especially in dealing with consumer credit debt where the vast majority of defendants are unrepresented, unsophisticated individuals.” (Cardello, supra).

Aside from these general objections, the specific objections to each form will now be discussed.

FORM A

In Form “A, which is to be used in the case of an original creditor, an authorized agent may make the affidavit. There is nothing in the form as provided to specify why an authorized agent instead of an employee is making the affidavit. Likewise, there is no explanation of how an authorized agent would have acquired the personal knowledge of the original creditor’s record keeping practices. Without this personal knowledge, the affidavit does not lay a foundation sufficient to authenticate contractual terms and billing statements so they may be admitted as evidence by the business records exception to the rule against hearsay.

It is worth noting that the Fourth Department is not the only department confronting these issues. The District Court in Nassau County has ruled in favor of defendants in credit card collection lawsuits where the debt buyer plaintiffs offered affidavits sworn to by individuals lacking personal knowledge of the record keeping practices of original creditors. For example: “Employees and agents of the assignee typically cannot provide such proof through their own affidavits since they lack personal knowledge of the assignor’s business and record-keeping practices.” CACH LLC v Fatima, 2011 NY Slip Op 51510(U) (Dist Ct Nassau Co). “The Plaintiff’s reliance upon the documents it submits is insufficient to make out a prima facie case entitling the Plaintiff to summary judgment. Simply annexing documents to the moving papers, without a proper evidentiary foundation is inadequate.” Rushmore Recoveries X, LLC v. Skolnick, 841 N.Y.S.2d 823, 15 Misc. 3d 1139(A). (Dist Ct Nassau Co 2007). Courts have also declined to consider affidavits seeming to lack personal knowledge in cases brought by original creditors. See Capital One Bank v. Levano, 9186/11, NYLJ 1202629074203 at *1 (Sup., NA, Decided November 4, 2013).

Further, paragraph 5 completely misstates the law regarding proof of a cause of action for account stated. The mere issuance of a statement without objection by a defendant is not enough. Plaintiff must submit affirmative proof regarding its procedure for mailing statements in general, and proof that statements were actually mailed to or received by the defendant. Without any evidence that the statements were actually mailed to the Defendant, or when they were mailed,

Plaintiff cannot claim that the defendant retained the statements without objection for an unreasonable amount of time. See, e.g. Arrow Employment Agency, Inc. v David Rosen Bakery Supplies, 2 A.D.3d 762, 769 N.Y.S.2d 732 (2nd Dept 2003). In Morrison Cohen Singer & Weinstein, LLC v Brophy, 19 A.D.3d 161, 798 N.Y.S.2d 379 (1 Dept. 2005), the Appellate Division reversed a grant of summary judgment on an account stated because the Plaintiff's evidence had not proved that the statements were actually mailed. No evidence was submitted of a normal procedure for mailing statements or of the mailing dates for any of the statements. Id. at 380. When these mailings took place is a critical component of plaintiff's burden of proof, as defendant may not have retained the statements without objection for an unreasonable amount of time. The reasonableness, or lack thereof, of defendant's failure to object cannot be demonstrated absent a showing of when the statements were actually mailed to defendant.

This wording is familiar to any attorney who defends against lawsuits seeking to collect debt. The standard of proof, however, is higher for entry of a judgment, even in the case of a default, than the vague allegations permitted in the initial complaint.

FORM B

The proposed 208.14-a(c) specifies that this form is to be used by debt buyers where there has been only one transfer of the subject account. It is therefore confusing to find that paragraph 3 of this proposed form allows for the possibility of more than one assignment.

We would reiterate the objections to authorized agents stated above. Indeed, given the higher burden of proof a debt buyer must satisfy, an authorized agent would not be likely to possess the requisite personal knowledge. How the affiant obtained the personal knowledge should be specified with particularity, in case the default judgment is later vacated.

We would also reiterate the objection to the language in paragraph 6 regarding a cause of action for account stated. "Plaintiff stated an account to defendant without objection by defendant" is, as discussed above, insufficient to support a cause of action for an account stated. Further, as this form is to be used where there has been an assignment, it is not the Plaintiff, but rather the Plaintiff's predecessor in interest, who stated the account. Defendant never sought an account with plaintiff where Plaintiff is a debt buyer. As a debt buyer, Plaintiff never issued an account to any defendant. It therefore cannot claim a cause of action for having stated an account to a defendant.

Finally, the last sentence of paragraph 2 is a hearsay statement. An affiant from a third party debt buyer cannot testify as to the terms of an agreement to which it was not a party.

FORM C

Form C, unlike the previous forms, requires that an actual employee of the original creditor make the affidavit. This establishes a much higher standard and likelihood that the person swearing to the transfer will have personal knowledge of that to which he or she swears. This should be consistent across any forms used in these lawsuits, whether actively contested or defaulted.

Unfortunately, the form only addresses whether a “pool of charged-off accounts” was sold. There is no sworn statement that the specific account at issue in the particular lawsuit was included in the transaction. This is a crucial part of the Plaintiff’s burden of proof. Failing to include the actual contract of assignment is contrary to the Best Evidence Rule. Under the Best Evidence Rule, the actual assignment, not a mere “Bill of Sale,” must be provided so the court can determine what rights and responsibilities were conferred under the assignments. This is well-settled law in New York State. (See Schack v Wormser, 185 N.Y.S. 580, App. Term 1st Dep’t 1920, Malloy v V.W. Credit Leasing, Ltd., 2008 NY Slip Op 52035 (U), (“Without the assignment contract itself, any recitation of the assignment’s terms ... is rank hearsay and contrary to the best evidence rule”)).

FORM D

Once again, given that this form is to be submitted where there has been only one transfer of the account, it is confusing to see that the form provides for multiple transfers.

Further, the affidavit is designed not to be sworn to by someone with personal knowledge. This affidavit is based on affidavits made by other non-parties. An affiant swearing to the contents of Form D would be offering third party statements for the truth of the matters asserted. A review of documents created by third parties does not equate to personal knowledge.

Further still, the sentence “These records were incorporated into the debt-buyer’s records and kept in the regular course of business” completely misstates the law. Indeed, “the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records” Standard Textile v Nat. Equipment Rental, 80 A.D.2d 911 (2d Dept. 1981), see also Rushmore Recoveries X, LLC v. Skolnick, 841 N.Y.S.2d 823, 15 Misc. 3d 1139(A). (Dist Ct Nassau Co 2007), stating that repetitive statements using the phrase “in the regular course of plaintiff’s business’ as if they were magic words, does not satisfy the business records exception to the hearsay rule.” The court in Carothers v GEICO Indem. Co., 24 Misc.3d 19, 882 N.Y.S.2d 802, N.Y.Sup.App.Term, 2009 stated, “Even assuming that the witness was familiar with plaintiff’s business practices and procedures ... and that, as an employee of plaintiff’s billing company, the witness would be competent to testify about such practices and procedures ... he still failed to establish, by laying the requisite foundation (see CPLR 4518[a]), that the documents were plaintiff’s business records and, therefore, admissible in court pursuant to the business records exception to the rule against hearsay.”

Without a witness competent to testify as to the authenticity of the original creditor's business records, they are inadmissible whether or not they are incorporated into the records of a third party claiming to have purchased the account on assignment. A requisite foundation for the admission of business records must be laid under CPLR § 4518[a]. "The Plaintiff's reliance upon the documents it submits is insufficient to make out a prima facie case entitling the Plaintiff to summary judgment. Simply annexing documents to the moving papers, without a proper evidentiary foundation is inadequate." Rushmore Recoveries.

FORM E

As in Form C, Form E only addresses whether a "pool of charged-off accounts" was sold. There is no sworn statement that the specific account at issue in the particular lawsuit was included in the transaction. This is a crucial part of the Plaintiff's burden of proof. Failing to include the actual contract of assignment is contrary to the Best Evidence Rule, as discussed in greater detail above.

CONCLUSION

We agree that questions of proof in default judgments should be decided by the same standards statewide. These proposed affidavits, however, tip an already imbalanced scale further in favor of the plaintiff. The trend in the cases attached to the proposed affidavits as well as those we have cited, is in favor of requiring a demonstration of personal knowledge by affiants. We urge the Advisory Committee to strive for an elevated statewide standard of proof for default judgments.



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By U.S. Mail and by email to OCArule208-14-a@nycourts.gov

December 4, 2013

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RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment

MFY Legal Services, Inc. (MFY) appreciates the opportunity to comment on the Office of Court Administration's (OCA) proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions. MFY also appreciates OCA's initiative in addressing the serious problems associated with default judgments in consumer credit transaction cases, particularly requiring "proof of ownership of the debt." However, for the reasons described below, MFY strongly opposes the proposed amendments because they would enable debt collectors to obtain default judgments based on "robo-signed" affidavits filled with hearsay and unverified information.

**MFY'S CONSUMER RIGHTS PROJECT'S EXPERIENCE WITH
DEFAULT JUDGMENTS IN CONSUMER DEBT CASES**

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 8,000 New Yorkers each year.

MFY's Consumer Rights Project provides advice, counsel and representation to low-income New Yorkers on a range of consumer problems, including debt collection lawsuits. On a regular basis we see the acute problems people face as a result of the routine entry of default judgments based on faulty information and robo-signed affidavits. Through our weekly hotline, we take calls from New York City's most vulnerable populations, many of whom are calling because their wages

are being garnished or their bank accounts are frozen due to a default judgment that was entered against them on the basis of fraudulent affidavits. Others are denied housing or employment because of these judgments. Examples of default judgments that were improperly obtained against our clients include:

- Default judgments obtained on debts that had already been settled or dismissed with prejudice;
- Default judgments obtained on debts that were the result of identity theft or mistaken identity—about which the consumer complained to the original creditor, but which was not forwarded to the debt buyer—and where the debt buyer’s affiant swore that he or she reviewed the file and there were no disputes on record;
- Default judgments based on affirmations of debt collection *attorneys* who have no personal knowledge of the client debt buyers’ business practices, much less the original creditors’ practices;
- Default judgments where debt buyers’ affiants swear to have access to the original creditors’ records, yet when the judgments are vacated and the cases restored to the calendar, in fact the debt buyers are unable to provide virtually any records from the original creditor.

ISSUES WITH ROBO-SIGNING AND POOR RECORD-KEEPING IN DEBT COLLECTION CASES AROUND THROUGHOUT THE COUNTRY

These problems are not unique to New York. The problem of “robo-signing” and faulty information in debt collection litigation has increasingly caught the attention of federal and state regulators, enforcers, and other government actors. In July 2013, an official from the Consumer Financial Protection Bureau testified that, “[t]oo often, important information about a debt, including whether a consumer has disputed the debt, does not travel with the debt when it gets assigned to third party collectors or purchased by a debt buyer. And it is often either not present or available . . . when owners of a debt file claims or seek judgments in courts.”¹

In April 2011, The Comptroller of the Currency (OCC) commenced a review of debt collection and sales activities across the large banks it regulates, focusing primarily on notary and affiant practices.² OCC’s “investigation into whether bank officials employed shoddy record-keeping and ‘robo-signing’ of affidavits and other documents in their own internal collection efforts” led to a disciplinary action against JPMorgan Bank.³ Among the OCC’s findings were that JPMorgan Bank filed affidavits by its employees or third-party debt collectors that made assertions that their statements in the affidavits were based on personal knowledge or a review of the bank’s records, when, in fact, they were based on neither. The OCC also found that

¹ *Shining a Light on the Consumer Debt Industry: Hearing Before The Senate Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection*, 113th Cong., 3-4 (2013) (Testimony of Corey Stone, Assistant Director, Office of Deposits, Cash, Collections, and Reporting Markets, Consumer Financial Protection Bureau), available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness_ID=00a7a97f-5645-4de4-9abe-b292b9a976c5).

² *Id.* at 5 (citations omitted).

³ Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, Am. Banker (July 2, 2013, 1:24pm ET), available at http://www.americanbanker.com/issues/178_127/occ-pressure-banks-to-clean-up-card-debt-sales-1060353-1.html?zkPrintable=true.

JPMorgan Chase filed or caused to be filed sworn affidavits with financial errors in favor of the bank.

An article in American Banker found that, in 2009 and 2010, in a series of transactions, Bank of America (BOA) sold portfolios of credit card receivables to debt buyer CACH LLC.⁴ BOA sold the debts “as is,” expressly without warranties about the accuracy or completeness of the debts’ records.⁵ The article went on to note that “records declared unreliable [by BOA] yet sold to CACH were used to file thousands of lawsuits against consumers” with “[t]he overwhelming majority of cases end[ing] in default judgments.”⁶ Notwithstanding the bank’s disclaimer as to the accuracy of its records, Bank of America employees submitted affidavits attesting to the validity of debts sold by the bank.⁷ In thousands of state court actions, CACH appended a single page from the purchase agreement attesting to ownership of delinquent credit card debt (omitting the other pages containing the disclaimers as to the accuracy of the records), and attorneys cited the reliability of BOA records as the basis to obtain judgments.⁸

These few examples show the inherent unreliability of these accounts and the lack of available records to document legitimate debts. These examples also reinforce the need to ensure that creditors and debt buyers are not given free rein to use the courts as a way to legitimize questionable debts without having to prove their validity.

MFY’S OBJECTIONS TO THE PROPOSED FORMS

The stated purpose of the proposed rules and the form affidavits is to “address the requirements of proof in consumer credit matters,” particularly in debt buyer cases where the plaintiff must demonstrate “proof of ownership of the debt.” While this is a laudable goal, for the following reasons we find that the proposed form affidavits would actually defeat this goal and make the current problems involving fraudulent default judgments even worse.

A. The proposed affidavits fail to establish a reliable chain of title for the debt.

A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. The proposed affidavits fail to establish a reliable chain of title because they allow original creditor and debt sellers to state only that they sold “a pool of charged-off accounts” without confirming whether the particular debt at issue was part of the sale.

Other states, out of concern for due process and procedural rights, have required stronger showings of proof of standing by debt buyers. For example, North Carolina passed legislation in 2009, which among other things, requires debt buyers to provide proof of each assignment in an

⁴ Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012 6:31 p.m. ET), available at http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html?zkPrintable=true. On a monthly basis, CACH bought debts with a face value of up to \$65 million for 1.8 cents on the dollar. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

unbroken chain of ownership.⁹ Each assignment must contain the original account number of the debt purchased, and must clearly show the debtor's name associated with the account.¹⁰

In Connecticut, the Small Claims Bench/Bar Committee has promulgated a checklist for processing judgments in small claims courts. As required by the checklist, debt buyers must provide an admissible affidavit showing unbroken assignment of the particular account.¹¹ Importantly, the affidavit cannot be a "generic" affidavit of debt by the original creditor.¹²

The Maryland Court of Appeals approved similar changes to Maryland's Rules of Civil Procedure.¹³ As proof of plaintiff's ownership, the debt buyer must provide in its affidavit a chronological listing of the names of all prior owners of the debt and the date of each transfer, and attach "a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner."¹⁴ The rule is clear that the bill of sale or other document must contain a "specific reference to the debt sued upon."¹⁵

B. The proposed affidavits would allow debt buyers to obtain judgments based entirely on inadmissible hearsay.

In the proposed form affidavits, it is the debt buyer that affirms that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. The debt buyer makes these statements based on access to the debt buyer's own books and records. However, as the FTC has confirmed, the debt buyer has no information in its possession to support these assertions.¹⁶

Even if the debt buyer did have access to this information from the original creditor, which it does not, its testimony would be entirely based on hearsay. The proposed Affidavit of Facts for a Debt-Buyer Plaintiff states that "plaintiff's records were made in the regular course of business and it was the regular course of such business to make the records." However, it is not plaintiff's records that establish that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. It is the original creditor's records that establish these facts. Debt buyers lack personal

⁹ N.C. Gen. Stat. §§ 58-70-150(1)-(2) ("Complaint of a debt buyer plaintiff must be accompanied by certain materials.").

¹⁰ *Id.*

¹¹ Ct. Gen. Stat. § 52-118 (2013).

¹² Ct. Practice Book Sec. 24-24 (2013), available at <http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>.

¹³ Md. Rule of Procedure 3-306(d)(1)-(4) (2013).

¹⁴ Md. Rule of Procedure 3-306(d)(3).

¹⁵ *Id.*

¹⁶ See Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* ii-iii (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>. In a landmark study, the FTC's key findings included that:

- "Buyers paid an average of 4.0 cents per dollar of debt face value."
- "Buyers rarely received dispute history."
- "Buyers received few underlying documents about debts."
- "Accuracy of information provided about debts at time of sale [were] not guaranteed."
- "Accuracy of information in sellers' documents [were] not guaranteed."
- "Limitations were placed on debt buyer access to account documents." And,
- "Availability of documents [were] not guaranteed."

Id.

knowledge of original creditors' business and record-keeping practice, and therefore they are not in a position to authenticate original creditors' business records. It is the original creditor that has the relevant information about the debt, as well as its own business and record-keeping practices, and is thus in the proper position to attest to the basic facts about the alleged debt.

C. The proposed affidavits would allow testimony from unknown "authorized agents."

The original creditor and debt buyer affidavits would improperly allow an affiant to testify based on an assertion that he or she is a mere "authorized agent" of the plaintiff with "personal knowledge and access to plaintiff's books and records . . . of the account of the defendant." This statement does not restrict the universe of potential affiants to employees of the plaintiff. Instead, it would allow the affidavit to be completed by a third-party debt collector who has no formal affiliation with the plaintiff and no knowledge of its business practices, but merely receives electronic records long after they were created for the purposes of debt collection. Such an individual would not have personal knowledge of the account sufficient to comply with New York evidentiary law.¹⁷ To comply with evidentiary law, the courts should not allow testimony by "authorized agents." Instead, OCA should require that the affiant be an employee of the original creditor, and that the affiant clearly set forth the basis for his or her knowledge.

RECOMMENDATIONS

Because of the great harms that improper default judgments can inflict – and have inflicted -- on New York's most vulnerable populations, it is essential that OCA adopt rules that ensure that debt collectors cannot take advantage of the court system to obtain default judgments based on "robo-signed" and legally insufficient affidavits. We recommend that OCA should not adopt the current proposed amendments and instead should propose amendments for comment that require a plaintiff to provide when seeking a default judgment in a consumer credit transaction:

- An affidavit from an employee of the original creditor attesting to the essential facts of the debt and the affiant's basis of knowledge of those facts;
- In assigned debt cases, an affidavit from the original creditor, and one from each intervening debt seller, attesting to the specific debt at issue.

In addition to these steps, MFY supports the recommendations made by the New York City Bar Association Consumer Affairs and Civil Court committees in their comments on the proposed rule amendment:

- OCA should actively support passage of the Consumer Credit Fairness Act (A.2678/S.2454), which, among other provisions, sets out the specific evidentiary support required for a debt buyer to obtain a default judgment, including an affidavit from the original creditor establishing the existence of the debt and the defendant's default, and affidavits proving all assignments of the debt. The bill also requires the plaintiff or

¹⁷ See *Unifund Ccr Partners v. Youngman*, 932 N.Y.S.2d 609,610 (App. Div. 4th Dept. 2011) (stating that affiant must have personal knowledge of business practices or procedures sufficient to establish how and by whom account documents are made and kept).

plaintiff's attorney to attest that based on reasonable inquiry, the statute of limitations has not expired.

- Applications for default judgments in consumer debt collection actions should include an affirmation by the plaintiff's attorney that that the attorney has reviewed the documentary evidence in support of the application and that it satisfies pertinent evidentiary and other legal requirements, as is the case with foreclosures.
- Because consumer debt collection actions do not involve "claim[s] . . . for a sum certain," entry of default action should occur following judicial inquest – either by hearing or on the papers submitted by the plaintiff.

Thank you for the opportunity to comment.

Sincerely,

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